Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 41.

LENORE FOMAN,
Plaintiff, Appellant,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Defendant, Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR DEFENDANT, APPELLEE.

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No. 41.

LENORE FOMAN,
Plaintiff, Appellant,

v.

ELVIRA A. DAVIS, Executrix,
Defendant, Appellee.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR DEFENDANT, APPELLEE.

Counter-Statement of Questions Presented.

1. Whether an appeal to the Court of Appeals is a nullity and properly dismissed as premature if taken from a District Court judgment as to which there is an outstanding motion to vacate and to amend made in the District Court within ten days of entry of the judgment.

2. In the case of a District Court's denial after judgment of motions which in substance are for leave to amend a complaint by adding a count, whether an appeal from such denial is sufficient to bring the judgment itself before the Court of Appeals.

3. Whether the District Court abused its discretion in denying a motion to vacate judgment to permit amendment, and a motion to amend the complaint by adding a count, after the action had been dismissed.

Additional Statutes and Rules Involved.

United States Code, Title 28, § 2107:

". . . [N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment. . . ."

Federal Rules of Civil Procedure, 28 U.S.C.:

"Rule 60.—Relief from Judgment or Order.

. . . . . .

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective ap-

plication; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

"Rule 73.—Appeal to a Court of Appeals,

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: . . . granting or denying a motion under Rule 59 to alter or amend the judgment . . .

"A party may appeal from a judgment by filing with the district court a notice of appeal. . . ."

Counter-Statement of the Case.

The complaint in this action alleged an oral agreement "at or about 1947" (R. 2-3) between the plaintiff and her father, the decedent, Wilbur W. Davis, whereby the plaintiff agreed to assume and pay all expenses for the care, treatment and maintenance of her mother, decedent's first wife, and to look after and care for her as long as she lived, and the decedent, in consideration therefor agreed to make and leave no will, to the end that the plaintiff, as his only child, would receive the share of his estate to which she would be entitled under the intestacy laws of Massachusetts.

The complaint further alleged that the plaintiff performed her part of the agreement until the death of her mother in 1953; that in 1957 the decedent married the defendant, Elvira A. Davis; that Wilbur W. Davis died in 1959, leaving an estate of approximately $60,000 and a will which has been duly probated in Massachusetts and of which the defendant is executrix.

Except for a bequest of $5,000 to his brother, the decedent by the terms of his will "devised and bequeathed" (R. 3-4) his entire estate to the defendant. The plaintiff sought damages in the amount of $40,000, the share of the estate which she would have received as his only child if Wilbur W. Davis had died intestate.

Jurisdiction in the District Court was based entirely on diversity of citizenship (R. 2).

Defendant moved to dismiss in the District Court (R. 6) and, after hearing, judgment was entered on December 19, 1960, dismissing the complaint (R. 9) in accordance with a memorandum of decision which had been previously filed (R. 6).

On December 20, 1960, the plaintiff moved to vacate judgment "in order to permit [her] to file a Motion to

Amend her Complaint by adding a second cause of action" (R. 9) in accordance with an amendment simultaneously proposed (R. 10). The proposed amendment, entitled "Second Cause of Action," alleged that the plaintiff paid money and rendered services for and on behalf of the defendant, Elvira A. Davis.

The plaintiff then filed, on January 17, 1961, notice of appeal to the Court of Appeals from the judgment of December 19, 1960 (R. 11). Later, on January 23, 1961, there was a hearing on petitioner's motions to vacate judgment and to amend her complaint, and both motions were denied that day (R. 2). On January 26, 1961, the petitioner filed a notice of appeal from the denial of her motions (R. 11).

On June 26, 1961, the Court of Appeals dismissed the appeal insofar as taken from the District Court's judgment of December 19, 1960, and affirmed the orders of the District Court of January 23, 1961 (R. 15). On August 17, 1961, a petition for rehearing was denied by the Court of Appeals (R. 22).

Petition for writ of certiorari was filed in this Court on November 14, 1961, and granted on January 8, 1962 (R. 22).

Summary of Argument.

I.

The plaintiff's appeal of January 17, 1961, from the District Court's judgment of dismissal was properly dismissed by the Court of Appeals as premature.

The plaintiff's motion to vacate judgment did not designate under which of the Federal Rules of Civil Procedure it was brought, but, having been brought within ten days after entry of the judgment, the full context of the Rules

dictated that the motion should be deemed to have been made under Rule 59 (e).

As a Rule 59 motion, it terminated the running of the time for appeal and suspended the finality of the judgment, pursuant to Rule 73 (a). In consequence, the appeal, taken while the motion was still pending, was premature and a nullity and was therefore properly dismissed by the Court of Appeals.

II.

The District Court's judgment of dismissal was not brought up for review to the Court of Appeals by the plaintiff's appeal of January 26, 1961, from the District Court's denial of her motions to vacate judgment and amend the complaint.

A. The motion to vacate judgment was explicitly for the purpose of allowing the plaintiff to amend in accordance with her motion to amend.

Viewed as a notice of appeal for the purpose of taking an appeal from the judgment of dismissal, the notice of appeal of January 26, 1961, was deficient because it designated only the District Court orders denying the motions to vacate and amend.

That deficiency cannot be met by reference back to the abortive appeal of January 17, 1961, because it would be contrary both to sound judicial administration and to jurisdictional limitations.

B. Considered by itself, the notice of appeal of January 26, 1961, limited the jurisdiction of the Court of Appeals to a review of the District Court orders denying the motions to vacate and amend.

The Court of Appeals was obliged to determine the extent of its own jurisdiction even though the matter was not raised by any of the parties.

C. Where the intent was not expressed in the notice of appeal of January 26, 1961, to appeal from the judgment of dismissal, that intent cannot be found in "the actions taken and the papers filed by the plaintiff." When she filed the notice of appeal of January 26, 1961, the plaintiff plainly thought she had appealed from the judgment of dismissal by her prior notice of appeal.

III.

The District Court was entirely justified in denying the plaintiff's motions to vacate judgment and amend her complaint.

A. Plaintiff's motion to amend failed to allege any action which related to the allegations of the original complaint. Her explanation is that she made an error. However, under those circumstances sound discretion would not require the District Court to vacate its judgment and allow the amendment.

Furthermore, the District Court should not be adjudged to have abused its discretion in the face of the possibility that outside the record there were further circumstances before it for its consideration in ruling on the plaintiff's motions.

B. The plaintiff says that she could assume that the District Court would consider itself, "bound," in the present case, by the interpretation of Massachusetts statutes set forth in *Cleaves* v. *Kenney*, 63 F. (2d) 682 (C.A. 1st Cir. 1933). On that premise she argues that, because the District Court did not consider the *Cleaves* case to govern in the case at bar, the District Court abused its discretion in denying her motions to vacate judgment and amend her complaint. The District Court, however, came to the carefully considered conclusion that under Massachusetts law the plaintiff's complaint failed to state a claim upon

which relief could be granted. The closeness of the District Court to Massachusetts law would warrant that in the present case its views should not be condemned as an abuse of discretion.

C. Plaintiff asserts an obligation on the part of the District Court to have allowed her motions on the basis that, in view of *Cleaves* v. *Kenney,* the District Court declared "a sudden change in law" or settled "a previously unsettled question." In framing her complaint on the basis of the *Cleaves* case, however, the plaintiff deliberately took the risk that Massachusetts law was not as she conceived it. By means of the *Cleaves* case she hoped to use the diversity jurisdiction of the United States courts to obtain a more favorable decision than she could get in the Massachusetts courts. Sound discretion should not become abuse of discretion because of "the after-thought of a disappointed litigant."

D. Presumably on the assumption that this Court will hold that the plaintiff has perfected an appeal from the District Court's judgment of dismissal, the plaintiff argues that the judgment of dismissal was in error because damages in quantum meruit are recoverable in an action for breach of contract. But it is evident that, quite deliberately, the only claim the plaintiff set forth was a claim on the alleged oral agreement. It is also evident that, with the same deliberateness, she argued on that basis alone in the District Court on defendant's motion to dismiss. As a result, the District Court, in good faith, took her at her word. She should not now be heard to complain.

Argument.

I. Plaintiff's Motion to Vacate Judgment having been Made within Ten Days of Entry of Judgment and Not being Disposed of when Appeal from the Judgment was Taken, That Appeal was a Nullity and was Properly Dismissed as Premature.

Plaintiff argues that the Court of Appeals should have treated her motion to vacate judgment as having been brought under Rule 60,[1] so that then the notice of appeal filed January 17, 1961, would not have been premature and the Court of Appeals would have reached the merits of the judgment entered by the District Court (pp. 14-20).[2]

In making that contention plaintiff resists its implications. If plaintiff's motion to vacate had been treated as brought under Rule 60, thereby leaving the finality of the judgment unaffected, the appeal taken on January 17, 1961, would have been rendered effectual, but at the same time the District Court would have been deprived of jurisdiction to entertain plaintiff's motion to vacate the judgment.

Daniels v. *Goldberg*, 8 F.R.D. 580 (D.C. S.D. N.Y. 1949); affd. 173 F. (2d) 911 (C.A. 2d Cir. 1949).

Switzer v. *Marzall*, 95 F. Supp. 721, 722-723 (D.C. D.C. 1951).

United States v. *Frank B. Killian Co.*, 269 F. (2d) 491, 494 (C.A. 6th Cir. 1959).

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[1] Reference to "Rule" or "Rules" is to the Federal Rules of Civil Procedure, 28 U.S.C.

[2] Page references are to brief for plaintiff if not otherwise indicated.

That posture of affairs would no more have suited the plaintiff than the present situation.

Plaintiff replies (pp. 20-22) that, although the District Court concededly would have been without jurisdiction to grant her motion to vacate while appeal from a final judgment was pending, it would have had "limited jurisdiction" to deny the motion and avoid the possibility of a useless remand by the Circuit Court for the purpose of a hearing of the motion by the District Court.

> Note, "Disposition of Federal Rule 60 (b) Motions During Appeal," 65 Yale L.J. 708, 712-713 (1956).

But that contention fails to meet the issue. "Limited jurisdiction" as such is entirely in keeping with the holding of the Court of Appeals in the present case that a motion to vacate a judgment made within ten days of the judgment should be construed as one under Rule 59 (e) (R. 14). Indeed, the very concept of "limited jurisdiction" underlines the desirability of preserving in all cases the unlimited jurisdiction of the district courts during the period of ten days after entry of judgment pursuant to Rules 59 (e) and 73 (a). The invocation of Rule 59 in combination with Rule 73 accomplishes fully and efficiently whatever "limited jurisdiction" may clumsily accomplish to a small degree. Under "limited jurisdiction" it may be that "a party need not drop his appeal until the lower court has indicated that it will grant the motion, and a potentially prejudicial choice is thus avoided" (Note, "Disposition of Federal Rule 60 (b) Motions During Appeal," 65 Yale L.J. 708, 711 (1956)); but Rule 73 permits a motion, when treated as made under Rule 59, to be granted directly as well as denied, and motions are after all brought with hope, if not always the expectation, that they will be

granted. Indeed, a manifest purpose of Rule 73, in suspending the finality of a judgment upon a timely motion under Rule 59, is to spare litigants entirely from the dilemma of having to choose between the prosecution of an appeal and the prosecution of motions brought after judgment but not disposed of as the appeal period is about to expire.

> See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177-178 (1944), referred to in Report of Proposed Amendments Prepared by the Advisory Committee on Rules for Civil Procedure, June, 1946, House Document No. 473, 80th Congress, 1st Session, p. 139; *Stevens* v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955); and *Gaudiosi* v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959); cert. den. 361 U.S. 902 (1959).

At the same time Rule 73 advances the policy "to have the whole case and every matter in controversy in it decided in a single appeal."

> *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1894). *Baltimore Contractors, Inc.*, v. *Bodinger*, 348 U.S. 176, 178 (1955).

Furthermore, a motion to vacate judgment, construed as a motion under Rule 59, may be considered on the broad grounds appropriate to a motion which suspends the finality of judgment rather than on the extraordinary grounds required by Rule 60.

> *John E. Smith's Sons Co.* v. *Lattimer Foundry & Machine Co.*, 19 F.R.D. 379, 381-382 (D.C. M.D. Penn. 1956); affd. 239 F. (2d) 815 (C.A. 3d Cir. 1956).

From the foregoing we can see why, in the case at bar, to have treated plaintiff's motion to vacate under Rule 60 rather than Rule 59 would have been to subvert the very system of appeals and post-judgment motions so carefully created by Rules 59, 60 and 73; we can see why there can be no quarrel with the view of the Court of Appeals that "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying such motions has not expired" (R. 14).

Stevens v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955).

In the words of this Court in *Kingman* v. *Western Manufacturing Co.*, 170 U.S. 675, 680 (1898):

> "The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion . . . We do not think it is . . ."

The finality of the judgment having been suspended by the motion to vacate and that motion not having been disposed of by the District Court when the appeal was taken on January 17, 1961, the appeal was properly dismissed as premature and a nullity.

United States v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

Gaudiosi v. *Mellon*, 269 F. (2d) 873, 877 (C.A. 3d Cir. 1959); cert. den. 361 U.S. 902 (1959).

Healy v. *Pennsylvania Railroad Co.*, 181 F. (2d) 934, 936 (C.A. 3d Cir. 1950); cert. den. 340 U.S. 935 (1951).

Reconstruction Finance Corp. v. *Monat*, 184 F. (2d) 44, 48 (C.A. 9th Cir. 19

Studer v. *Moore*, 153 F. (2d) 902 (C.A. 2d Cir. 1946).

Stevens v. *Turner*, 222 F. (2d) 352 (C.A. 7th Cir. 1955).

Lohr v. *United States*, 264 F. (2d) 619 (C.A. 5th Cir. 1959); cert. den. 361 U.S. 814 (1959).

Kelly v. *Pennsylvania Railroad Co.*, 228 F. (2d) 727 (C.A. 3d Cir. 1955); cert. den. 351 U.S. 925 (1956).

II. The Appeal Taken by Plaintiff from the Post-Judgment Orders of the District Court was Insufficient to Bring the Judgment Itself before the Court of Appeals.

Certain provisions of the statutes and rules require consideration at this point.

Section 1291 of Title 28 of the United States Code provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

Section 2107 of Title 28 provides:

> ". . . [N]o appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after entry of such judgment . . ."

Rule 73 (a) of the Federal Rules of Civil Procedure provides:

> "A party may appeal from a judgment by filing with the district court a notice of appeal."

Rule 73 (b) provides:

> "The notice of appeal . . . shall designate the judgment or part thereof appealed from . . ."

A. In the foregoing provisions of the statutes and rules is described an objective system for the orderly prosecution of appeals.

It is a system premised, first of all, upon the existence of a "final" decision or judgment. As pointed out above (I, pp. 9-12, *supra*), an appeal taken from a judgment before the judgment has become final is premature and must be dismissed as a nullity.

Beyond the requirement that there be a final decision or judgment, there must be a timely notice of appeal which designates the judgment or part thereof from which appeal is being taken.

In the case at bar the notice of appeal filed January 26, 1961, by the plaintiff designated only the orders of the District Court made on January 23, 1961, denying her motion to vacate judgment and to amend her complaint. The motion to vacate judgment was explicitly "in order to permit the plaintiff to file a Motion to Amend her Complaint by adding a second cause of action . . . in accordance with [the] Motion herewith filed" (R. 9).

Viewed as a notice of appeal for the purpose of taking an appeal from the judgment of December 19, 1960, the notice of appeal of January 26, 1961, is patently deficient as a matter of substance.

Carter v. *Powell*, 104 F. (2d) 428, 430 (C.A. 5th Cir. 1939); cert. den. 308 U.S. 611 (1939).

Gannon v. *American Airlines, Inc.*, 251 F. (2d) 476, 482 (C.A. 10th Cir. 1957).

That deficiency in substance cannot be met, as the plaintiff suggests (pp. 26-29), by means of a transfusion from the ghost of the abortive appeal of January 17, 1961.

We are not dealing here with "one of those technicalities to be easily scorned" (*Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120, 124 (1945)). Regarded as a matter involving nothing more than an application of rules, to the end of achieving sound judicial administration, the following thoughts from *Healy v. Pennsylvania Railroad Co.*, 181 F. (2d) 934, 936-937 (C.A. 3d Cir. 1950); cert. den. 340 U.S. 935 (1951), are appropriate:

> "We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to 'just, speedy, and inexpensive' litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct, with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought."

Beyond the application of rules, however, there is a crucial jurisdictional block to the plaintiff's attempt to infuse substance into the appeal of January 26, 1961, from the lifeless appeal of January 17, 1961.

In *Stevens* v. *Turner*, 222 F. (2d) 352, 354 (C.A. 7th Cir. 1955), the court said:

> ". . . [D]efendant's appeal, taken while his motion to amend the judgment was pending, was premature. We acquired no jurisdiction by virtue of it and no after-occurring action or event can inject vitality into it."

In *Lohr* v. *United States*, 264 F. (2d) 619 (C.A. 5th Cir. 1959); cert. den. 361 U.S. 814 (1959), the court said:

> ". . . [A]ppellant says that her appeal of August 25, 1958, even though taken from a non-appealable order, was in the nature of a 'continuing' or a 'suspending' notice of appeal which attached to any final decision in the case; and that either the order granting the voluntary non-suit on December 9 [1958] constituted a final decision or it converted the order dismissing the United States as a party defendant into a final decision with effective date of December 9.
>
> "While in sympathy with appellant's plight, we cannot afford to give the Judicial Code or the Rules of Procedure any such fictional construction. Rule 73 (a), F.R. Civ. P., 28 U.S.C.A., states simply that 'the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from • • •.' (60 days where the United States is a party.) This 'judgment appealed from' must be either a 'final decision' under 28 U.S.C.A. Sec. 1291 or a certain 'interlocutory decision' under 28 U.S.C.A. Sec. 1292. Here, the 'judgment appealed from' was the order of dismissal of August 12, 1958. • • • It was neither a final nor an interlocutory decision of the kind which will support an appeal to this Court. The appeal is therefore dismissed."

B. So far as concerns the notice of appeal filed January 26, 1961, when considered by itself, that notice of appeal itself limited the jurisdiction of the Court of Appeals to review of the orders of January 23, 1961.

> *Donovan* v. *Esso Shipping Co.*, 259 F. (2d) 65 (C.A. 3d Cir. 1958); cert. den. 359 U.S. 907 (1959).

To have given that notice of appeal any wider effect would have enlarged the scope of the review and so would have been a step clearly beyond the discretion which the Court of Appeals has to disregard procedural irregularity of no substance.

> *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group*, 311 U.S. 579, 582-583 (1941).
>
> *Georgia Hardwood Lumber Co.* v. *Compania de Navegacion Transmar, S.A.*, 323 U.S. 334, 336 (1945).

A Court of Appeals must, of course, always satisfy itself as to its jurisdiction even though the matter is not raised by any of the parties.

> *Fleming* v. *Borders*, 165 F. (2d) 101 (C.A. 9th Cir. 1947).
>
> *Oneida Navigation Corp.* v. *W. & S. Job & Company, Inc.*, 252 U.S. 521 (1920).

C. As we have seen (II, A, pp. 14-16, *supra*), the plaintiff did not, in keeping with Rule 73 (b), designate the judgment of December 19, 1960, as being appealed from in

the notice of appeal filed January 26, 1961. We are told, however, in plaintiff's brief (p. 27), that "the intent [in the notice of appeal of January 26, 1961] to appeal from the judgment of dismissal is, in fact, manifested to the appellate court by the actions taken and the papers filed by the plaintiff."

As was said in *Johnson* v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48, 51 (1952), with regard to a motion to set aside a verdict which the moving party said he intended as a motion for judgment or new trial:

> "The defect in this argument is that respondent's motion cannot be measured by its unexpressed intention or wants. . . . Respondent's motion should be treated as nothing but what it actually was . . ."

We advert to the remarks of the Court of Appeals (R. 21-22):

> "Also, militating against plaintiff's position that the second notice of appeal was intended to be an appeal from the original judgment of dismissal is the factor that plaintiff plainly thought she appealed from that judgment by her first notice of appeal. Now that that notice of appeal has been held premature, plaintiff contends that the second notice of appeal is sufficient. We believe, however, that under the principles of the above-cited cases, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.
>
> "If plaintiff's second appeal was in her mind intended to encompass the old cause of action rather than, or in addition to, the proposed new one, it was deficient not technically, but in substance."

III. Denial of Plaintiff's Motion to Vacate Judgment so as to Permit her to Amend her Complaint, and Denial of her Motion to Amend her Complaint, were Proper.

A. There is a basic deficiency in the plaintiff's motion to amend which fully justified the District Court's denial of that motion and the concomitant motion to vacate judgment.

A reading of the "Second Cause of Action" proposed by the plaintiff in her motion to amend (R. 10) will disclose at once that it fails to allege any action which relates to the allegations in the original complaint (R. 2). The original complaint, it will be recalled, claims damages for breach of contract from the estate of Wilbur W. Davis on the ground that the plaintiff, *for and on behalf of Wilbur W. Davis*, provided and paid for care and maintenance of his first wife in consideration of his alleged promise, later unfulfilled, to die without making a will. In contrast, the proposed "Second Cause of Action" alleges that the plaintiff paid money and rendered services *for and on behalf of Elvira A. Davis*, the executrix of the will of Wilbur W. Davis. Obviously, allowance of the plaintiff's motion to amend would not have enabled her to recover for any money or services she may have ever paid or rendered for or on behalf of Wilbur W. Davis.

See *Shopneck* v. *Rosenbloom*, 326 Mass. 81, 82 (1950).

Turner v. *White*, 329 Mass. 549, 553 (1952).

In her brief (p. 31, n. 18) plaintiff says the references to "defendant" in the proposed amendment were an "obvious slip" and were intended to read "decedent." But, as with plaintiff's second notice of appeal (pp. 17-18, *supra*),

the motion "cannot be measured by its unexpressed intention or wants."

Johnson v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48, 51 (1952).

Certainly sound discretion did not require the District Court to vacate its judgment and allow an amendment which, to say the least, would have to be amended again.

What was said in oral argument at the hearing on plaintiff's motions before the District Court is not part of the record in this case, and it would be out of order to give an account here. Suffice it to say that the precise point just set forth may well have been raised and discussed, and then spurned by the plaintiff, at that hearing. Therein lies the wisdom of the position taken by the Court of Appeals that "there is nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions" (R. 15).

Plaintiff complains (p. 39) that the District Court filed no opinion explaining its denial of the motion to amend. But no explanation was necessary; the motion speaks for itself.

B. Notwithstanding the deficiency in her motion to amend, just discussed (A, *supra*), the plaintiff insists that the District Court denied her due liberality in the matter of amending her complaint, particularly in view of *Cleaves* v. *Kenney*, 63 F. (2d) 682 (pp. 35-40).

Cleaves v. *Kenney* was decided by a divided court in 1933 by the Circuit Court of Appeals for the First Circuit. It held an oral agreement to destroy a will to be enforceable. Of course, such was not the agreement which the plaintiff here alleged.

Whatever the import of *Cleaves* v. *Kenney* on its precise facts, however, the case at bar being in the federal courts

only because of diversity of citizenship, the function of the District Court was to look to the Massachusetts statutes and the decisions of the Massachusetts Courts, just as in a case heard in a court of Massachusetts, and from them determine what rights, if any, the plaintiff had.

> *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945).

That the District Court fully and conscientiously performed its function is manifest from its Memorandum of Decision on Defendant's Motion to Dismiss (R. 6).

It is appropriate to consider that, although *Cleaves* v. *Kenney* may have involved "what were known as matters of 'local' law" prior to *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) (*Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202, 209 (1938)), it was decided prior to the *Erie Railroad Co.* case, and, even in its own day, on its own particular facts, *Cleaves* v. *Kenney* was decided under the shadow of a vigorous dissent. It was the carefully considered conclusion of the District Court that in today's light, including that of a recent Massachusetts decision, the decision in *Cleaves* v. *Kenney* should not be extended to the case at bar. This Court has observed that a result of the *Erie Railroad Co.* case is to require "a sharper analysis of what federal courts do when they enforce rights that have no federal origin."

> *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 112 (1945).

Where "[t]he precise issue of state law involved . . . is one which has not been decided by the . . . [state] courts," this Court has said, in *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949):

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."

The closeness of the District Court to Massachusetts law would warrant that in the present case its views should not be condemned as an abuse of discretion.

United States v. *Durham Lumber Co.*, 363 U.S. 522, 527 (1960).

C. In her brief (p. 40) the plaintiff contends that, in view of *Cleaves* v. *Kenney*, 63 F. (2d) 682 (C.A. 1st Cir. 1933), the ruling of the District Court on her motions to vacate judgment and amend was such "a sudden change in law," or such a "settling" of "a previously unsettled question," that the District Court was required to allow those motions as a matter of law.

Disregarding for present purposes the basic deficiency in plaintiff's motions which is pointed out above (A, pp. 19-20, *supra*), it is utterly apparent that the plaintiff made a conscious choice in framing her complaint exclusively as an action on the alleged agreement rather than as both an action on the agreement and an action in quantum meruit. That is the whole of the contention in her brief (p. 40):

> "From the memorandum of decision of the district judge (R. 6, esp. 8) as well as the briefs submitted by both parties it was clear that, in framing her complaint, the plaintiff relied on a decision of the First Circuit which stood unreversed, *Cleaves* v. *Kenney*, 63 F. 2d 682 (1933). Plaintiff could assume that a district judge in the Circuit would consider himself bound by that

> decision (see pp. 12-14 of Brief for Appellant). When, however, the district judge refused to follow the earlier precedent rendered by his superior tribunal and dismissed the complaint, is it not in order that plaintiff be given leave to amend?"

Also to be noted is the plaintiff's statement of the case at page 6 of her brief:

> "In setting forth her cause of action in a single count based upon the oral agreement, plaintiff relied upon *Cleaves* v. *Kenney* . . ."

The choice made by the plaintiff involved an obvious risk of the ever-present possibility that the Massachusetts law was not as she conceived it to be. Persuasive, even convincing, as the majority opinion in *Cleaves* v. *Kenney* may have seemed to the plaintiff, it could only dispose of that particular case. It could not settle the proper construction of the Massachusetts statutes.

> *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 5, 74 (1937).

Indeed, the plaintiff's choice must be said to have been a deliberate, calculated choice, in which she carefully selected the federal forum for the intended purpose of exploiting what she considered to be a fortuitous opportunity and in which she consciously eschewed a count in quantum meruit in favor of a bold attack. She was "shopping for a favorable forum" (*Eager* v. *Kain*, 158 F. Supp. 222 (E.D. Tenn. S.D. 1957)), a "die-hard" refusing to recognize that *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), has long since ended the day "that a litigant in cases where federal jurisdiction is based only on diverse citizenship

may obtain more favorable decision by suing in the United States courts."

> *York* v. *Guaranty Trust Co.*, 143 F. (2d) 503, 529, 531 (C.A. 2d Cir. 1944), quoted favorably upon review, *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 111 (1945).

Sound discretion, least of all in the case of a claim of the nature here presented, does not require that a litigant should be relieved of the consequences of a conscious, deliberate, calculated, free choice which hindsight indicates was wrong. To borrow a phrase, the plaintiff's cry of abuse of discretion sounds like "the after-thought of a disappointed litigant."

> *Delman* v. *Federal Products Corp.*, 251 F. (2d) 123, 126 (C.A. 1st Cir. 1958).

D. In her brief (pp. 32-35) the plaintiff has made an extended argument to the effect that damages in quantum meruit are recoverable in an action for breach of contract. It is an argument which assumes that the plaintiff has perfected an appeal from the District Court's judgment of dismissal. But whether the plaintiff has perfected such an appeal is, of course, a major issue in this case (I and II, pp. 9-18, *supra*).

It is in any event evident from plaintiff's own brief (p. 40), as quoted above (C, pp. 22-23), that, quite deliberately, the only claim she set forth was on the alleged oral contract, and that, with equal deliberateness, she argued on that sole basis in the District Court on the defendant's motion to dismiss. It is evident, too, from its Memorandum of Decision (R. 6) that the District Court took the plaintiff at her

word and, in good faith, proceeded accordingly. The plaintiff has no cause to complain now.

Conclusion.

On the basis of the foregoing argument it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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